IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Criminal Appeal No. 1154 of 2001
(Old No. 1724/1983)

Shankar Bahadur and others…… Appellants
Versus

State of Uttaranchal …… Respondent

None for the appellant.
Mr. S.P.S. Panwar, Government Advocate for the State.

Coram: Hon. S.H. Kapadia, C.J.
Hon. Irshad Hussain, J.

Dated: 18.09.2003:

PC:

None appears for the appellants.

Issue notice to the appellants. List after three weeks for final hearing.

(Irshad Hussain, J.) **(S.H. Kapadia, C.J.)**

AK:

IN THE HIGH COURT OF UTTARANCHAL NAINITAL

Chapter VIII, Rule 32(2) (b)

Description of case

Date of decision: 03.07.2006

Criminal Appeal No. 1154 of 2001
(Old No. 1724 of 1983)

1. Shankar Bahadur
   S/o Asi Bahadur
   R/o Village Gadoli, P.S. Pauri
   District Pauri Garhwal.
2. Moti Singh
   S/o Man Singh
   R/o Village Gadoli
   P.S. Pauri
   District Pauri Garhwal.
3. Kali Bahadur
   S/o Anusuya Prasad
   R/o Village Gadoli, P.S. Pauri
   District Pauri Garhwal.
4. Man Bahadur
   S/o Bishan Bahadur
   R/o Village Gadoli, P.S. Pauri
   District Pauri Garhwal. .....…..Appellants

Versus

State .....…. Respondent

Mr. L.K. Tewari, Advocate for appellant No. and Amicus Curiae for appellants Nos. 2 to 4.
Mr. H.C. Pande, Additional Government Advocate for the State.

A.F.R. (Approved for Reporting)
Not approved for Reporting

(Initials of Judges)

Date: 03.07.2006

Judgment Reserved

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Versus

State ....Respondent

Mr. L.K. Tewari, Advocate for appellant No. 1 and Amicus Curiae for appellants Nos. 2 to 4.
Mr. H.C. Pande, Additional Government Advocate for the State.

Coram: Hon'ble Rajeev Gupta, C.J,
Hon'ble Prafulla C. Pant, J.

Per: Hon'ble Prafulla C.Pant, J.

This appeal, preferred under Section 374 (2) of Code of Criminal Procedure, 1973 (herein-after referred as Cr.P.C.), is directed against the judgment and order

dated 19.07.1983, passed in Sessions Trial No. 10 of 1983, whereby the then learned Sessions Judge, Pauri Garhwal has convicted appellants Shankar Bahadur, Moti Singh, Kali Bahadur and Man Bahadur under Section 302 read with Section 149 of Indian Penal Code, 1860 (herein after referred as I.P.C.) and each one of them has been sentenced to imprisonment for life. Appellant Shankar Bahadur has been further sentenced to pay a fine of Rs. 500/- in default of payment of which he is directed to undergo rigorous imprisonment for one year.

2. Shri L.K. Tewari, who is counsel for appellant No. 1 Shankar Bahadur, was appointed Amicus Curiae for other appellants to the case on their behalf also. We heard Amicus Curiae and learned counsel for the appellants and learned Additional Government Advocate for the state, and perused the entire record.

3. Prosecution story, in brief, is that complainant Laxmi Devi (P.W. 4 is widow of Har Bahadur (deceased). Her husband Har Bahadur was in service of Forest Department in a nursery at Gadoli, District Pauri Garhwal. P.W. 4 Laxmi Devi used to live with her husband in a temporary shed (DERA). Near by their residence, at some distance, accused labourers Man Bahadur, Kali Bahadur and Moti Singh used to live with accused Shankar Bahadur, who had employed them with him. Accused persons Man Bahadur, Kali Bahadur, Moti Singh and Shankar Bahadur used to

molest Smt. Laxmi Devi (P.W. 4) by showing currency notes to her and used to wink at her. She complained about the conduct of accused persons to her husband. On which, Har Bahadur, husband of Smt. Laxmi Devi, objected to their conduct. Since then, they started nourishing grudge against Har Bahadur (deceased). On 07.01.1983, at about 10:00 A.M. Har Bahadur sought permission from P.W. 2 Darban Singh under whom he was working in the nursery, to go to ease out himself in the forest. When he went to ease out, he met on the way, accused persons Man Bahadur, Kali Bahadur, Moti Singh and two other Nepali companions. At that time, P.W. 4 Laxmi Devi was carrying cow-dung. She saw above named accused persons Man Bahadur, Kali Bahadur, and Moti Singh with their two associates, quarrelling with and beating her husband. On seeing this, she raised an alarm. P.W.1 Ram Lal, P.W. 2 Darban Singh, P.W. 5 Prem Bahadur and few other labourers rushed towards the scene of occurrence, where they saw accused Moti Singh along with other Nepali labourers, pushing Har Bahadur down from a hill. Har Bahadur on being pushed down lost his control and rolled down from 40 to 50 ft. and fell down on the road. The witnesses and complainant rushed to the place where Har Bahadur was lying in an injured condition and waited for some conveyance to take him (Har Bahadur) to the hospital but since no conveyance was available for ½ an hour, Har Bahadur succumbed to the injuries. On the same day i.e. 07.01.1983, at about 11:30 A.M., P.W. 4 Smt. Laxmi Devi lodged oral

First Information report with police station Pauri, which was at a distance of 8 kms. away from the place of occurrence. Head Constable Pitamber Datt, prepared the check report (Ext. A-2) on the basis of oral First Information Report and endorsed the same in the General Diary (Extract of which is Ext. A-3 on the record). A crime No. 08 of 1983 was registered against accused/appellants Shankar Bahadur, Moti Singh, Man Bahadur, Kali Bahadur and two unknown persons for offence allegedly committed by them, punishable under Section 304/109/147/149 I.P.C P.W. 7 Sub-Inspector Udai Pal Singh investigated the crime. He went to the place of occurrence, took the dead body in his possession and prepared the inquest report (Ext. A-5), sketch of the dead body (Ext. A-6), police form No. 13/33 (Ext. A-7) and letter (Ext. A-8), to the Chief Medical Officer, requesting for post mortem examination. The Investigating Officer collected the simple soil and blood stained soil from the place of occurrence and prepared memo (Ext. A-4). He recorded the statements of the witnesses and prepared the site plan (Ext. A-9). After making arrest of the accused persons, he submitted charge sheets (Ext. A-11) before the court against all the four accused persons, for their trial in connection of the offences allegedly committed by them, punishable under Section 147, 149, 302, 109 I.P.C.

4. Magistrate after receiving the charge sheets, supplied the necessary copies to the accused persons, as

required under Section 207 of Cr.P.C. and committed the case to the Court of Sessions for trial. Learned Sessions Judge, after hearing the prosecution and the defence, framed only one charge of offence punishable under Section 302 read with Section 149 I.P.C. against all the four accused persons namely, Shankar Bahadur, Man Bahadur, Kali Bahadur and Moti Singh. All the four denied the charge and claimed to be tried. On this, prosecution got examined P.W. 1 Ram Lal, an eye-Witness, P.W. 2 Darban Singh, another eye-witness, P.W. 3 Dr. N.V. Singh, who conducted autopsy, P.W. 4 Smt. Laxmi Devi (widow of the deceased), an informant and eye-witness, P.W. 5 Prem Bahadur yet another eye-witness, P.W. 6 Constable Vishveshwar Prasad, who took the dead body in sealed condition and investigated the crime. All the oral and documentary evidence was put to the accused persons under Section 313 of Cr.P.C. in reply to which they have alleged the same to be false. No evidence in defence was adduced on behalf of the accused persons. Learned Sessions Judge, after hearing the Public Prosecutor and the learned counsel for the accused persons, before the trial court, found all the four accused persons namely, Shankar Bahadur, Man Bahadur, kali Bahadur and Moti Singh, guilty of charge of offence punishable under Section 302 read with Section 149 of I.P.C. and convicted them. And after hearing on sentence, each one of them is sentenced to imprisonment for life. Accused Shankar Bahadur was further sentenced to a fine of Rs. 500/- in default of payment of which, he is

directed to undergo further one-year's rigorous imprisonment. Aggrieved by said judgment and order dated 19.07.1983, passed by learned Sessions Judge, this appeal was preferred before the Allahabad High Court in the year 1983, from where it is transferred to this Court under Section 35 of U.P. Reorganisation Act, 2000, for its disposal.

5. Before further discussions, it is pertinent to mention here the ante mortem injuries found on the person of the deceased (Har Bahadur), at the time of post mortem examination (Ext. A-1) conducted by P.W. 3 Dr. N.V. Singh. Post mortem examination report, discloses following ante mortem injuries on the person of the deceased:-

1. **Contusion 5cm x 3cm obliquely place 1cm below the right ear extending towards mastoid process, reddish in color, section underneath tissue shows sign of bleeding, underneath temporal bone and part of occipital bone show linear fracture, which was placed in oblique direction. Underneath of the fracture maningies and brain were intact, fracture shows sign of bleeding.**
2. **Abrasion 1cm x 5cm over and entire aspect of left pinna,**

reddish in colour, clotted blood present in external ear.

3. **Lacerated wound 2cm x 0.5cm x muscle deep over palm aspect of right hand obliquely placed 1 cm below proximal pharynx of right middle finger.**
4. **Abrasion 1.5 cm x 1cm horizontally placed over left side of back of chest 1cm lateral and left of the spine, 10 cm below hape of neck reddish in colour.**
5. **Abrasion 105 cm x 1cm reddish in colour placed 22 cm below injury No. 4 parallel to it.**
6. **Abrasion 1cm reddish in colour placed 1cm below injury No. 5.**
7. **Abrasion 2cm x 1.5cm over the skin of left tibia, 9cm below the left knee joint reddish in colour.**

On internal examination of the body, the aforesaid medical officer found semi-digested material present in him abdomen and in small intestines. He found partially digested food material and gases present in large intestines. He further found pale and faecal matter present in the large intestine. The spleen of the deceased was found large in size measuring 16cm X

12Cm and found soft and pulpy lacerated wound measuring 5cm X 1cm X 1.5cm on concave surface of spleen. The medical officer opined that the cause of death was syncope due to rupture of spleen.

6. The star eye-witness of the case, P.W.4 Smt. Laxmi Devi, informant is the widow of the deceased. Narrating the prosecution story, she says that she got married to Har Bahadur (deceased) about 1 ½ years before the date of the incident. She along with her husband, were working in a nursery in Gadoli. They used to live there in a hut and some fifty steps away from them, accused persons who were also laborers had their huts. Accused P.W. 4 Laxmi Devi further states that accused persons Man Bahadur, Kali Bahadur and Moti Singh used to molest her by showing currency notes and used to wink at her. When she complained the matter to her Husband, he objected about their conduct, to the above named three accused persons. But they were defended by accused Shankar Bahadur, who instigated them to kill him (Har Bahadur). A few days thereafter, on 07.01.83, Har Bahadur was working in the nursery along with P.W. 1 Ram Lal, P.W. 5 Prem Bahadur, one Ram Kali and others. After sometime, Har Bahadur sought permission from P.W. 2 Darban Singh under whom they were working to go to ease out himself. At that time the witness (P.W. 4 Laxmi Devi) was carrying a basket of cow-dung. She saw accused persons Man Bahadur, Kali Bahadur, Moti Singh along with two unknown persons had surrounded Har

Bahadur. On this, P.W. 4 Laxmi Devi shouted for help. On hearing the shouts, P.W. 1 Ram Lal, P.W. 2 Darban Singh and P.W. 5 Prem Bahadur, also came towards the place of incident. Meanwhile, accused persons Man Bahadur, Kali Bahadur, Moti Singh, pushed Har Bahadur down from the hill. Within seconds Har Bahadur, rolled down from the hill and fell on road. Accused persons thereafter fled from the scene of occurrence. When P.W. 4 Laxmi Devi reached on the road, she found that her husband (Har Bahadur) is lying in an unconscious condition and he was bleeding through his ears. To take her husband to hospital, she waited for half-an hour on the road but no vehicle was available and her husband succumbed to the injuries. She thereafter, went to lodge the First Information Report on the basis of which her oral report, check report (Ext. A-2) was prepared. She proved the document.

7. To corroborate the prosecution story, as narrated above, P.W. 1 Ram Lal, P.W. 2 Darban Singh and P.W. 5 Prem Bahadur, all the three eye-witnesses were got examined by the prosecution. In substance, the prosecution story, as narrated by P.W. 4 Laxmi Devi, has been corroborated by each of these three eye-witnesses. But on close scrutiny of the entire ocular description of the incident, given by the witnesses, we found that accused Shankar Bahadur is said to have exhorted the other three accused persons Man Bahadur, Kali Bahadur and Moti Singh. However, the said fact is

not mentioned in the First Information Report that Shankar Bahadur at the time of incident, on 07.01.1983, exhorted the three accused persons namely Man Bahadur, Kali Bahadur and Moti Singh to kill Har Bahadur. According to check report (Ext. A-2), the exhortation, attributed to accused/appellant Shankar Bahadur is of the date when Har Bahadur objected to the conduct of accused persons regarding molestation of Smt. Laxmi Devi by showing currency notes and winking at her. The date of incident is about a week thereafter. As such, it cannot be said that accused/appellant Shankar Bahadur had any common intention in the commission of the crime with any of the other accused/appellants.

8. Now, this Court has to examine the prosecution evidence, if all the remaining three accused/appellants Man Bahadur, Kali Bahadur and Moti Singh pushed down deceased (Har Bahadur) from the hill with intention to kill him or not. P.W. 2 Darban Singh in his cross examination has specifically mentioned that it was only accused Moti Singh, who pushed down Har Bahadur from the hill and not others. As such, merely for the reason that other two accused/appellants, Man Bahadur and Kali Bahadur who were unarmed had surrounded the deceased it cannot be held that they had common intention to commit culpable homicide. As such, from the entire evidence on record, it is established that it is only Moti Singh who pushed down

deceased Har Bahadur from the hill due to which he received injuries and succumbed to the same.

9. Now, we have to examine whether the act of pushing down the deceased, on the part of accused/appellant Moti Singh, from a hillock, which endangered his life and ultimately resulted in his death, amounts to culpable homicide amounting to murder or not. Exception 4 to Section 300 of I.P.C. reads as under:-

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

In the present case, none of the appellants including Moti Singh was armed with any weapon. The cause of death in the present case, as mentioned above, is syncope due to rupture of spleen. It is also found at the time of post mortem examination by P.W. 3 Dr. N.V. Singh that the spleen of the deceased was enlarged one. It cannot be presumed in the absence of otherwise evidence that the accused/appellant was aware that the deceased had an enlarged spleen. In ***Karam Singh Vs. State of Punjab 1994 Supreme Court Cases (Cri) 64*** in similar circumstances, causing death by inflicting lathi blow to a person which resulted in rupture of liver and spleen was held to be a culpable homicide not amounting to murder and the Apex Court found the appellant to have committed the offence punishable

under Section 304 Part II instead of one under Section 302 I.P.C., and reduced the sentence of imprisonment for life to rigorous imprisonment for five years.

10. On behalf of the appellants, it is argued that appellant Moti Singh was minor at the time of commission of crime. However, no such plea appears to have taken before the trial court nor is it so mentioned in the grounds of appeal, filed before the Allahabad High Court. Copy of the general diary (extract of which is Ext. A-10 on the record) shows that this appellant Moti Singh was aged 30 years on the date of his arrest. As such, the contention on the part of the learned counsel for the appellants is not acceptable.

11. For the reasons as discussed above, we have no hesitation in holding that from the evidence on record, it is established that the prosecution has been successful in proving beyond reasonable doubt, the charge of culpable homicide not amounting to murder, only as against accused/appellant Moti Singh. At far as the other appellants are concerned, we are of the opinion, after the appreciation of evidence, as above, that the prosecution has failed to prove charge against rest of the appellants namely Shankar Bahadur, Man Bahadur and Kali Bahadur, beyond reasonable doubt. Apart from this, there is yet another error of law committed by learned trial court that it has convicted the accused/appellants under Section 302 read with Section 149 I.P.C. without holding that they formed an

unlawful assembly. In the circumstances, since no charge against the appellants Shankar Bahadur, Man Bahadur and Kali Bahadur is proved beyond reasonable doubt, their appeal deserves to be allowed and they are entitled to acquittal from the charge framed against them.

12. Accordingly, appeal of appellants Shankar Bahadur, kali Bahadur, and Man Bahadur is allowed. They are acquitted of the charge framed against them. Appellant Shankar Bahadur is on bail. He need not surrender. Rest of the accused/appellants Man Bahadur and Kali Bahadur, if in jail, they be released forthwith if not required in any other case. Appeal of Moti Singh is partly allowed. He is convicted under Section 304 part II instead of 302 I.P.C., and sentenced to rigorous imprisonment for five years. The period already spent by him in jail during the trial and appeal shall be adjusted against the sentence awarded by this Court.

(Prafulla C. Pant, J.) **(Rajeev Gupta, C.J.)**

Dt: 03.07.2006
Sweta